IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL APPEAL NO. 29 of 2002

Shri Ajit S. Porob
R/o House No.133/3
Palmar Pomburpha,
Bardez, Goa. ... Appellant.

versus

1. Mrs. Lavina J. B. Machado,
   A-1/5, Dona Alcina Resort,
   Candolim, Bardez-Goa.

2. State of Goa,
   through Public Prosecutor. ... Respondents.

Ms. Rakhi M. Chodankar with Ms. Gauri Bhonsle, Advocates for the Appellant.

Mr. Joseph Vaz, Advocate for Respondent No.1.

Mr. S. N. Sardessai, Public Prosecutor for the State/ Respondent No.2.

CORAM: P. V. HARDAS, J.

DATED: 21ST NOVEMBER, 2003.

ORAL JUDGMENT

The Appellant/Original Complainant, by the instant Appeal questions the correctness of the acquittal

of the Respondent passed by the learned Judicial Magistrate First Class, Mapusa, by Judgment dated 26th March, 2002, in Criminal Case(Other Acts) No.491/2000/SR/I acquitting the Appellant/Original Complainant for an offence punishable under Section 138 of the Negotiable Instrument Act(hereinafter referred to as the Act) for the sake of brevity.

2. The facts that are necessary for the decision of this Appeal are set out hereunder:-

The Appellant/Original Complainant filed a complaint on 19th August, 2000, before the learned Judicial Magistrate First Class, Mapusa, against Respondent No.1 herein for an offence punishable under Section 138 of the Act. It was averred in the complaint that Respondent No.1 herein was the owner of a plot situated at Aldona bearing survey no.314/2 of village Aldona and the Appellant/Original Complainant had been engaged in the construction of the bungalow of the Accused on the said plot. The Appellant/Original Complainant had issued a Bill No.7 and as part payment towards the discharge of the liability of Bill No.7, the Complainant had issued a cheque for an amount of Rs.28,598/- dated 27th June, 2000, drawn on the Corporation Bank, Mapusa, Goa. The said cheque is at Exh.PW1/A. The Complainant had presented the said cheque for encashment. However,

the cheque was returned back by the Bank of the drawer with the endorsement that "payment had been stopped by the drawer". The Memos of the respective Bank are at Exhs.PW1/B and PW1/C. The Complainant, therefore, through his Advocate, issued a notice at Exh.PW1/D. The notice has been duly received and the postal registration slip and the acknowledgement are at Exhs.PW1/E1 and PW1/E2. The Respondent/Accused submitted a reply which is at Exh.PW1/F.

3. In response to the summons issued by the learned Trial Court, the Accused appeared and in pursuance to explaining the particulars of the offence, the Accused denied her guilt and claimed to be tried. The Complainant examined himself as P.W.1. The Accused did not examine herself or any other witnesses. The learned Trial Court dismissed the complaint principally on the ground that in view of the pendency of a civil dispute between the parties and the pendency of the civil dispute itself showed that a legally enforceable debt was in dispute and, therefore, an offence under Section 138 of the Act was not made out. The learned Trial Court, therefore, dismissed the complaint as the aspect of the pendency of the Civil Suit "compels me to give benefit of doubt to the Accused". It is this Judgment which is assailed by the Appellant/Original Complainant in the present Appeal.

4. The Appellant/Original Complainant examined himself as P.W.1 at Exh.8. He states that he had undertaken the construction work of the house of Respondent/Accused at Aldona. The Respondent/Accused had paid all the earlier six bills and the Accused did not pay the seventh bill. The amount of the seventh bill was 2,05,662/- and against the said bill towards part payment, the Accused had issued the cheque for Rs.28,598/-. P.W.1, Ajit Parab, then speaks about the presentation of the cheque and the bouncing of the cheque of payment. In the cross-examination, he has admitted as correct that the Respondent/Accused was constructing a bungalow and the Complainant was the contractor. He has also admitted that he had given quotation of the work and rates to the Accused. He has denied that the quotation was approved by the Consulting Engineer by name Agnelo Oliveira. He has further stated that he was giving the running bills to the Accused and the Accused used to get them passed from the said Consulting Engineer. He has also admitted that the six bills paid by the Accused were paid to him after the Consulting Engineer had certified the bills. He has also admitted that the six bills were paid without causing any inconvenience. In the further cross-examination, he has admitted "I have given the seventh running bills. The cheque was towards part payment of running bills". In the cross-examination, he was asked whether he had anything to show whether the seventh bill was passed by the Consulting

Engineer. The Appellant/Original Complainant had answered by stating that it was not his concern as he was giving bills to his client namely the Accused. In the cross-examination, he was shown certain photographs which were marked at Exhs.DW1/A, DW1/B, DW1/C and DW1/D to suggest that the nature of the work of construction had not been performed by the Appellant/Original Complainant properly. The photographs were shown to P.W.1, Ajit Parab, to suggest that the quality of the work was substandard which resulted in the leakage of the roof. It was also suggested in the cross-examination which he admitted as correct that the Respondent/Accused had filed a Civil Suit. The pleadings between the parties are at Exh.PW1/E.

5. Ms. Rakhi M. Chodankar, learned Counsel appearing on behalf of the Appellant and who has very ably argued the Appeal has submitted that the impugned Judgment is wholly unsustainable as firstly the learned Trial Court has dismissed the complaint filed by the Appellant/Original Complainant being oblivious to the provision of Section 139 of the Act which mandates the raising of the presumption regarding the issuance of cheque towards the discharge of a debt or liability. The learned Counsel appearing on behalf of the Appellant has further urged that mere filing of the Civil Suit or issuance of a reply by themselves do not amount to placing

any material on record so as to rebut the presumption under Section 139 of the Act. The learned Counsel appearing on behalf of the Appellant has further submitted that issuance of the cheque is not denied by the Respondent/Accused and all that the Respondent/Accused contends is that the quality of the construction was substandard and a dispute is, therefore, raised regarding the quantum of the bill and the amount payable. This according to the learned Counsel appearing for the Appellant is no evidence of rebuttable of the presumption.

6. Mr. Joseph Vaz, learned Counsel appearing on behalf of Respondent No. 1 has urged before me that issuance of a reply and filing of a Civil Suit in pursuance to the reply, which is prior to the filing of the complaint, is sufficient to rebut the presumption. Secondly, he has urged before me that the various photographs in the stage of the completion of the building clearly demonstrate that the Appellant/Original Complainant had carried substandard construction and, therefore, there was no legally enforceable debt or liability and the presumption, if any, stood rebutted. Mr. Vaz, learned Counsel appearing on behalf of Respondent No.1 has placed on record written submissions which are marked "X" for the purpose of identification. In the said written submissions, reference is made to the contents of the Civil Suit as well as to the contents of

the reply. Written submissions also contain a reference to the various authorities on which the Respondent/Accused proposes to rely which I shall advert to shortly.

7. Perusal of the Judgment of the learned Trial Court shows that the learned Trial Court has dismissed the complaint filed by the Appellant/Original Complainant oblivious of Section 139 of the Act. The learned Trial Court in para 6 of its Judgment has held that to make out the offences punishable under Section 138 of the Negotiable Instruments Act that the Accused owes legally enforceable debt to the Complainant has to be certain. If by any chance it is shown to the Court that legally enforceable debt is itself in dispute then the main ingredient of the offence punishable under Section 138 of the said Act is not made out. The learned Trial Court then further went on to state that in the statement under Section 313 of the Code of Criminal Procedure the Accused specifically said that she does not owe any amount to the Complainant and she had filed a Civil Suit. This aspect, that is the institution of the Civil Suit, persuaded the learned Trial Court to give benefit of doubt to the Accused.

8. The Apex Court in **Hiten P. Dalal** v. **Bratindranath Banerjee** reported in (2001) 6 SCC 16 in paragraph 23 has held thus:-

> "23. In other words, provided the facts required to form the basis of a presumption of law exist, no discretion is left with the court but to draw the statutory conclusion, but this does not preclude the person against whom the presumption is drawn from rebutting it and proving the contrary. A fact is said to be proved when,
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> > "after considering the matters before it, the court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists"
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> Therefore, the rebuttal does not have to be conclusively established but such evidence must be adduced before the court in support of the defence that the court must either believe the defence to exist or consider its existence to be reasonably probable, the standard of reasonability being that of the "prudent man".

9. The Apex Court in **K. N. Beena** v. **Muniyappan and another** reported in (2001) 8 SCC 458 has held that under Section 139 the Court has to presume, unless the contrary was proved, that the holder of the cheque received the cheque for discharge, in whole or in part, of a debt or liability. The Apex Court further observed that

in complaints under Section 138, the court has to presume that the cheque had been issued for a debt or liability. This presumption is rebuttable and the burden of proving that a cheque had not been issued for a debt or liability is on the Accused.

10. I have already adverted to the reason as to why Respondent No.1 was acquitted by the learned Trial Court. I will now examine whether the issuance of a reply to the notice of the Complainant and in pursuance to the reply, filing of the Civil Suit would amount to rebuttable of the presumption.

11. In the present case, the admitted position is that Respondent/Accused issued a cheque. The Respondent/Accused has also admitted in her statement under Section 313 of the Code of Criminal Procedure that she had issued the cheque. In response to Question No.6, the Respondent/Accused has stated that there is a Civil dispute between her and the Complainant and that she does not owe any amount to the Complainant. According to her, the Complainant owes some amount to her and, therefore, it is not a legally enforceable debt. It is also not disputed, as it emerges from the evidence on record that the Appellant/Complainant was engaged as a contractor. Six running bills in respect of the construction of the house of the Respondent/Accused had been paid by the

Accused. It is also not disputed that the seventh running bill was presented to the Respondent/Accused for payment. It is vaguely suggested in the cross-examination of the Complainant that the seventh running bill was not certified by the Consultant. It is also suggested to the Complainant in the cross-examination that the work carried out by him was of substandard quality and in respect thereof a Civil Suit has been filed. These averments are also made in the reply to the notice of the Complainant.

12. For a defence, that the debt is not legally enforceable debt or liability to succeed it should be brought on record that the drawer is not liable to pay any amount to the drawee. A breach of the terms of contract or institution of a suit in relation to the breach of contract cannot be a defence to hold that the drawer is not liable to pay to the drawee or in other words, there is no legally enforceable debt or liability. Once the presumption of the Act is drawn, it is for the Accused or the drawer to establish before the Court that the cheque had not been issued towards any legally enforceable debt or liability. To say that the drawee has not performed his part of the contract or has committed breach of the contract resulting in loss to the drawer and, therefore, the drawer is not liable to pay the amount would not in my considered opinion amount to rebuttal. The rebuttal of the presumption should be in respect of the "legally

enforceable debt or liability". In the present case, the Appellant/Complainant had presented the seventh bill for payment. He had already been paid his earlier bills. Undeniably, the Appellant/Complainant was engaged as a contractor for the construction of the bungalow and the cheque had been issued towards a part payment of the seventh running bill. In such circumstances, mere dispute as to the quality of the construction though for breach of the contract, would not entitle the Respondent/Accused to claim such defence that the cheque had not been issued towards the discharge of legally enforceable debt or liability. The reasoning of the learned Trial Court is wholly perverse and unsustainable in law.

13. Mr. Joseph Vaz, learned Counsel appearing on behalf of Respondent No.1 has placed reliance on a Judgment of the Apex Court in **Modi Cements Ltd.** v. **Kuchil Kumar Nandi** reported in (1998) 3 SCC 249. Reliance is specifically placed by Mr. Vaz, learned Counsel on head note B of the said Report which reads as under:-

> "Negotiable Instruments Act, 1881 - S.138 - Insufficiency of funds at the time of drawing of the cheque, held, will not justify drawing of presumption of dishonesty on the part of the drawer under S.138 - Drawer entitled to make deposits or make arrangement for sufficiency of funds in his account before

presentation – S.138 attracted only when the cheque is dishonoured".

14. Relying on the aforesaid Judgment of the Apex Court, it is submitted by the learned Counsel appearing on behalf of Respondent No.1 that the Respondent/Accused had sufficient funds in her account and the cheque has not been dishonoured on account of insufficient funds but dishonoured on account of instructions from the Respondent/Accused to her banker to stop payment. Thus, Mr. Vaz, learned Counsel appearing on behalf of Respondent No.1, submits that there is a civil dispute pending between the parties and it would be highly inappropriate for this Court to decide the dispute in relation to this cheque in these proceedings.

15. Reliance on the aforesaid Judgment does not advance the case of the Respondent any further. Admittedly, the cheque was returned unpaid on account of stoppage of payment and the provisions of Section 138 of Negotiable Instruments Act, 1881, would squarely apply to such bouncing of the cheque. Since a Civil Suit is pending between the parties, the various contentions in respect of breach of contract would be examined by the appropriate Court. However, the fact that a Civil Suit was instituted, would not in any manner, according to me, be considered as evidence sufficient to rebut the presumption under Section 139 of the Act. The reasoning

of the learned Trial Court is totally perverse and is unsustainable.

16. In the result, therefore, Criminal Appeal No.29 of 2002 is allowed. The Judgment of the learned Trial Court acquitting the Respondent/Accused is hereby quashed and set aside and the Respondent/Accused is convicted for the offence under Section 138 of the Negotiable Instruments Act, 1881. At this juncture, the Judgment is stopped to hear the Respondent/Accused on sentence.

17. The Respondent/Accused is heard on the point of sentence. The Respondent/Accused states that she is a lady of 55 years of age and is suffering from heart ailment and, therefore, prays for leniency in respect of the sentence to be awarded.

18. Considering the fact that the Respondent/Accused is a lady of 55 years of age and suffering from heart ailment, according to me, the following sentence would meet the ends of justice. The Respondent/Accused is sentenced to Simple Imprisonment till rising of the Court and to pay a fine of Rs.3000/-, in default of payment of fine Simple Imprisonment for one week. In addition, the Respondent/Accused shall pay compensation under Section 357(3) of the Code of Criminal Procedure of Rs.28,598/-, with a default stipulation of Simple Imprisonment of 15

days in the event the compensation is not paid. Six weeks time is granted on request of the Respondent/Accused to pay the amount of fine and the compensation as the Respondent/Accused states that she wants to challenge this Judgment in the Apex Court. The amount of compensation, if recovered, be paid to the Appellant/Original Complainant.

19. The Appeal stands allowed accordingly.

Certified Copy expedited.

P. V. HARDAS, J.

RD.